[Case Title] In re: Dow Corning Corporation, Debtor
[Case Number] 95-20512
[Bankruptcy Judge] Arthur J. Spector
[Adversary Number]XXXXXXXXXX
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UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

In re: DOW CORNING CORPORATION, Case No. 95-20512
Chapter 11

Debtor.
_______________________________________/

APPEARANCES:

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OPINION ON DEBTOR'S MOTION FOR PARTIAL SUMMARY JUDGMENT AGAINST CLAIMS ASSERTED BY CERTAIN PHYSICIAN CLAIMANTS UNDER THE TEXAS DECEPTIVE TRADE PRACTICES ACT

Proofs of claim were filed against the Debtor's estate by 47 physicians from the State of Texas ("Physicians"). They assert a number of causes of action, one of which is based upon the Texas Deceptive Trade Practices Act. Tex.Bus. & Com.Code. § 17.01 et. seq. ("DTPA"). The Debtor objected to the claims and filed a motion for partial summary judgment, contending that the Physicians do not have standing to prosecute a claim against it under the DTPA because they do not qualify as "consumers" under Texas law. The motion requests that the Court disallow the portion of the Physicians' proofs of claim that are based upon the DTPA. For the reasons which follow, the

Debtor's request will be granted against 39 of the Physicians.[1]

Introduction

The Debtor was a leading manufacturer of silicone-gel breast implants from 1964 until 1992, at which time it withdrew from the breast implant market. During this period of time, the Physicians assert that a significant portion of their practices consisted of performing breast augmentation procedures using silicone-gel breast implants either manufactured by or containing materials supplied by the Debtor. As litigation over the safety of breast implants mounted, so did the legal concerns of the Physicians. Specifically, they have been named or fear that they will be named as co-defendants in lawsuits brought by former patients alleging that the breast implants caused them injury. The Physicians have in turn asserted claims against the Debtor that are both derivative and direct in nature.

The derivative claims seek reimbursement or indemnification in the event that a physician is found personally liable to a breast implant claimant for injuries caused by one of the breast implants. The direct claims allege that, in the course of marketing its breast implants to the Physicians, the Debtor committed common law fraud and violated the deceptive trade practices acts in the states where the Physicians reside by misrepresenting the extent and results of the product safety testing performed on breast implants. The Physicians contend that this conduct caused them lost profits, mental anguish and damage to reputation. See In re Dow Corning Corp., 244 B.R. 634, 642-43 (Bankr. E.D. Mich. 1999) (discussing the nature of the proofs of claim filed by physicians).

[1]Only 46 Physician claims are involved here as the claim of one of the Texas Physician Claimants – Dr. Richard McCrea – was previously disallowed in toto.

On June 9, 1998, the Debtor filed its omnibus objection to all of the Physicians' claims. At present, it is proceeding only on its objections to the Physicians' direct claims. See Claim Objection No. 22 Scheduling Order, December 22, 1998 (establishing scheduling order for the prosecution of the Debtor's objections to the Physicians' direct claims and reserving its right to prosecute its objections to the derivative claims at a later date). After the close of discovery on the Debtor's objections to the Physicians' direct claims, the Debtor filed the motion that is addressed herein.

Sufficiency of the Physicians' Proofs of Claim

The completion and filing of a proof of claim in conformity with 11 U.S.C. § 502(a) and Bankruptcy Rule 3001(f) constitutes prima facie evidence of the validity and amount of that claim. Hemingway Transp., Inc. v. Kahn (In re Hemingway Transp., Inc.), 993 F.2d 915, 925 (1st Cir. 1993); Holm v. Holm, 931 F.2d 620, 623 (9th Cir. 1991); In re Dow Corning Corp., 250 B.R. 298, 321 (Bank. E.D. Mich. 2000). The Debtor does not assert that the Physicians' proofs of claim have failed to attain this status. As a result, it has the burden of overcoming this prima facie validity by proffering evidence equal in probative force to that which underlies the Physicians' proofs of claim. Holm, 931 F.2d at 623; Dow Corning, 250 B.R. at 321. If the Debtor succeeds at this task, the burden of proof will shift to the party who has the ultimate burden of persuasion at trial, which in this case is the Physicians. FDIC v. Union Entities (In re Be-Mac Transp. Co.); 83 F.3d 1020, 1025 n.3 (8th Cir. 1996); Holm, 931 F.2d at 623; Dow Corning, 250 B.R. at 321.

To prevail on their DTPA cause of action the Physicians must establish that they incurred damages. Dagely v. Haag Engineering Co., 18 S.W.3d 787, 791 (Tex. App. 2000, no writ). They primarily seek to recover damages in the form of lost profits. Under Texas law, recovery of lost profits requires the plaintiff to show "the amount of the loss by competent evidence with reasonable certainty." Holt Atherton Indus., Inc. v. Heine, 835 S.W.2d 80, 84 (Tex. 1992); White v. Southwestern Bell Telephone Co., Inc., 651 S.W.2d 260, 262 (Tex. 1983).

The Physicians state that they incurred losses as a result of the following sequence of events. The Debtor represented to them that it had performed scientific studies conclusively showing that breast implants were safe. Physician[s]' . . . Response to . . . [the Debtor's] Omnibus Motion for Summary Judgment (Lack of Damages Evidence) at 1.[2] Relying on these representations, the Physicians made treatment recommendations to their patients. According to the Physicians, when it became public knowledge that adequate proof of breast implant safety testing did not exist, "a crisis of fear and hysteria" ensued which "had a devastating effect on the[ir] medical practices." Id. at 2. The amount of damages listed on the Physicians' proofs of claim ranges from "unknown" or "unliquidated" to $8,501,324.[3]

The Debtor has gone forward and cast doubt upon the existence of damages -- one of the elements of the Physicians' cause of action. They did so through the discovery process. In their deposition testimony, the Physicians asserted that the breast implant crisis led to a decline in the

[2]The Debtor has also filed a summary judgment motion seeking to disallow the Physicians' proofs of claim in their entirety on the ground that they are not capable of proving that they incurred damages as a result of the Debtor's actions. That motion is not addressed.

[3]Despite the Debtor's lack of protestation to the contrary, an argument could be made that none of the Physicians' proofs of claim are entitled to prima facie validity. Those that list the amount of damages as "unknown" or "unliquidated" would clearly seem to be incomplete. And while the Court does not do so here, a fair argument could be made that a proof of claim seeking recovery for a disputed, unliquidated tort claim should, as a general rule, not be afforded prima facie validity. This point is largely moot, however, for the evidence before the Court is sufficient to cast doubt on the Physicians' ability to prove the amount of their lost profit damages to a reasonable certainty.

number of breast implant procedures that they performed, a reduction in patient referrals and a decrease in the number of existing breast implant patients returning for other types of procedures. Id. at 5-6 (citing the deposition testimony of the Physicians). Some of the Physicians provided some tax returns to an accountant who drew some conclusions. However, the Physicians have not proffered any business records or other documentary evidence to demonstrate that their practices were in fact affected in this manner and to what degree.

Another element of the Physicians' cause of action is to show that they are "consumers" under the Act. There is much uncertainty with respect to the identity of the purchasers of the implants. The surest way to identify the purchasers would be through business records or some other form of documentary evidence such as bills, invoices or receipts. And, as one would expect, the Debtor asked the Physicians to identify the entity or person who purchased the implants, the number and types of implants purchased, the amounts the patients were charged for the implants, and the person or entity that actually billed the patients for the implants. Debtor's Interrogatory No. 18. The Debtor also asked the Physicians to produce any documents supporting their answer to this interrogatory. Debtor's Request for Production No. 1. In their response to this request, the Physicians stated that such information had already been supplied through prior production and through their deposition testimony. See Physicians' Answer to Interrogatory No. 18 and Response to Request for Production No. 1.

The Physicians' response to the Debtor's discovery request raises a number of concerns. First, and contrary to what the Physicians stated, it does not appear that the information requested by the Debtor was ever supplied through prior production. The fact that neither party proffered documentary evidence of this sort during the hearing is strong support for this conclusion. But the more perplexing aspect of the Physicians' response is why they would decline to produce this documentary evidence. It is the Physicians who bear the ultimate burden of proof on the issue of whether they qualify as consumers. And the documentary information sought by the Debtor goes to the very crux of this issue. Moreover, it would appear that this information is either in the possession of the Physicians or could easily be obtained from the hospitals where they performed the implant procedures or from the professional associations where they were employed. Because the Physicians failed to produce documentary evidence tending to show that they were consumers and because this is evidence which would normally be expected to be in their own possession or easily accessible to them, an inference adverse to their position that they are consumers may arise for purposes of moving the burden of going forward from the objecting party to the claimant. See McMahan & Co. v. Po Folks, Inc., 206 F.3d 627, 632 (6th Cir. 2000) ("[T]he general rule is that 'where relevant information . . . is in the possession of one party and not provided, then an adverse inference may be drawn that such information would be harmful to the party who fails to provide it.'") (citation omitted).

For these reasons, whatever prima facie validity the Physicians' proofs of claim may have been entitled to is defeated by the evidence before the Court and the lack of evidence provided by the Physicians. The Physicians, therefore, have the burden of proving each element of their claims against the Debtor.

Summary Judgment Standards

It is appropriate to grant summary judgment when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c) (incorporated into bankruptcy through F.R.Bankr.P. 7056); Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); Cox v. Kentucky Dept. of Transp., 53 F.3d 146, 149 (6th Cir. 1995). The moving party carries the initial burden of proving that there are no genuine issue of material fact and that it is entitled to judgment as a matter of law. Street v. J.C. Bradford & Co., 886 F.2d 1472, 1477 (6th Cir. 1989). When, as is the case here, the nonmoving party will bear the burden of proof at trial, the movant can meet the initial burden by relying solely on evidentiary sources listed in Rule 56(c). Celotex, 477 U.S. at 324; Cox, 53 F.3d at 149. The burden will be satisfied upon a showing that the nonmoving party has failed to produce evidence that would create a genuine issue of material fact for the trier of fact. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986); Kain v. Nesbitt, 156 F.3d 669, 671 (6th Cir. 1998).

Once the moving party has carried its burden, the nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material fact." Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). The nonmoving party "must come forward with 'specific facts showing that there is a genuine issue for trial.'" Id. at 587 (quoting Fed. R. Civ. P. 56(e)); see also Celotex, 477 U.S. at 324 (Rule 56(e) "requires the nonmoving party to go beyond the pleadings and by her own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'"). In addition, inferences drawn from the evidence presented must be viewed in favor of the nonmoving party. Matsushita, 475 U.S. at 587; Crabbs v. Copperweld Tubing Products Co., 114 F.3d 85, 88 (6th Cir. 1997).

Whether the Physicians Qualify as Consumers Under the DTPA

The DTPA provides consumers with protection against false, misleading or deceptive trade practices and, to this end, grants a cause of action to consumers who have been harmed by such acts. Amstadt v. United States Brass Corp., 919 S.W.2d 644, 649 (Tex. 1996); Tex.Bus. & Com.Code § 17.50(a)(1). A plaintiff must establish that: "(1) he was a consumer of the defendant's goods or services; (2) the defendant committed false, misleading, or deceptive trade practices in connection with the lease or sale of goods or services; and (3) such acts were a producing cause of actual damages to the plaintiff." Dagely, 18 S.W.3d at 791; Guest v. Cochran, 993 S.W.2d 397, 407 (Tex. App. 1999, no writ). The burden of proof on each of these elements belongs to the plaintiff. Farmers and Merchants State Bank v. Ferguson, 617 S.W.2d 918, 920 (Tex. 1981) ("The plaintiff has the burden of proof on all elements of his cause of action under the DTPA. This includes proof that he was a consumer.").

At issue here is whether the Physicians are "consumers" with respect to the purchase of the silicone-gel breast implants that they used in their medical practices. "Whether or not a plaintiff is a consumer under the DTPA is a question of law to be determined by the court." Rojas v. Wal-Mart Stores, Inc., 857 F. Supp. 533, 536 (N.D. Tex. 1994). Nevertheless, disputed facts bearing upon this determination are to be decided by the trier of fact. Vinson & Elkins v. Moran, 946 S.W.2d 381, 406 (Tex. App. 1997, writ dism'd). The DTPA defines "consumer" as "an individual, partnership . . . [or] corporation . . . who seeks or acquires by purchase or lease, any goods or services . . . ." Tex.Bus. & Com.Code § 17.45(4). Establishing consumer standing, therefore, requires the plaintiff to show that he, she or it sought or acquired the goods or services by purchase or lease. Arthur Anderson & Co. v. Perry Equip. Corp., 945 S.W.2d 812, 815 (Tex. 1997); Kennedy v. Sale, 689

S.W.2d 890, 892 (Tex. 1985).

The DTPA is to "be liberally construed and applied to promote its underlying purposes." Tex.Bus. & Com.Code § 17.44(a). Adhering to this rule of construction, Texas law provides that consumer standing does not require the plaintiff to be the actual purchaser or lessee of the goods or services. Arthur Anderson, 945 S.W.2d at 815; Kennedy, 689 S.W.2d at 892.[4] Thus, contractual privity between the plaintiff and defendant is not required. Amstadt, 919 S.W.2d at 649; Flenniken v. Longview Bank and Trust, 661 S.W.2d 705, 707 (Tex. 1984). Rather, "[a] plaintiff establishes [his] standing as a consumer in terms of [his] relationship to a transaction, not by a contractual relationship with the defendant." Birchfield v. Texarkana Memorial Hosp., 747 S.W.2d 361, 368 (Tex. 1987); Arthur Anderson, 945 S.W.2d at 815.

1. The Nature of the Physicians' Relationships to the Transactions

The Debtor argues that the Physicians' relationship to the transactions forming the basis of their claims is insufficient for them to qualify as consumers. The transactions in question are those involving the purchase of the silicone-gel breast implants that the Physicians used in their medical practices (the "Implant Purchases").[5] Determining the nature of the Implant Purchases and, thus,

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[4] In fact, it is unnecessary for the defendant to be the actual seller or lessor of the goods or services. Flenniken v. Longview Bank and Trust, 661 S.W.2d 705, 706-07 (Tex. 1984) (defendant bank found liable under the DTPA for actions taken in connection with a mechanic's lien note that it had acquired by assignment); Cameron v. Terrell & Garrett, Inc., 618 S.W.2d 535 (Tex. 1981) (home buyers held to be consumers vis à vis real estate agent who misrepresented the size of the house).

[5] Aside from their deposition testimony, the Physicians have not proffered any evidence that would definitively establish that they even used the Debtor's silicone-gel breast implants. And if the Physicians did not use the Debtor's product, then the transactions forming the basis of their claims would not have occurred. For purposes of this opinion, however, the Court will assume that these transactions did in fact occur.

the Physicians' relationship to them, has proven to be difficult.

The deposition testimony revealed the following. All of the Physicians maintained that they used the Debtor's implants in their medical practices. Approximately half of the Physicians, however, provided no information on who purchased the implants ("Group A Physicians"). Exhibit B to Motion; Exhibit A to Response to Motion. Of those Physicians who did provide information on this issue, a significant number acknowledged that they were not the actual purchasers of the implants ("Group B Physicians"). Seven Physicians asserted that they purchased the implants themselves (the "Purchasing Physicians").

The Group B Physicians testified that the implants they used were purchased by either their professional associations or the hospitals where they performed the implant procedures. When the professional associations were the purchasers, the Group B Physicians' relationship to the purchasing entity was that of an employee. See Transcript, January 6, 2000 at 41-42 (counsel for Physicians acknowledging that the Physicians are employees of their professional associations);[6] see also Neurobehavorial Associates, P.A. v. Cypress Creek Hosp., Inc., 995 S.W.2d 326, 331-32 (Tex. App. 1999, no writ) (recognizing that a physician who was the owner and sole director of his professional association was also an employee of the association); Tex.Rev.Civ. Stat. art. 1528f §§ 6 & 24 (Vernon Supp. 2000) (implicitly recognizing that individual members of a professional association are also employees of that entity).

[6] In a post-hearing submission, the Physicians denied having made this admission. Response to the Debtor's Reply at 2 ("Contrary to [the Debtor's] misrepresentations, Physician Claimants have not admitted that they are employees."). But their admission was made on the record. At the hearing, the Physicians' counsel stated: "A physician while technically I guess if he has a professional association . . . is [an] employee . . . as far as the IRS is concerned . . . ." Transcript, January 6, 2000 at 42.

The situation is somewhat different when the hospital was the purchaser of the implants. The Debtor contends that, under these circumstances, each Group B Physician's relationship to the purchasing entity was that of an independent contractor. Reply to Physician Claimants' Post-submission Brief (Consumer Issue) at 3. But the Physicians' relationship to the purchasing entity is actually one step removed from this. In this situation, the Physician would have still been an employee of the professional association. And it would have been the professional association, not the Physician, that was contracting to provide medical services to the hospitals. Cf. Neurobehavorial Associates, P.A., 995 S.W.2d at 328 (physician's professional association had entered into a contract to provide medical services to a hospital). Consequently, when it was a hospital that purchased the implants, the Group B Physician would have been employed by an independent contractor of the purchasing entity.[7]

2. The Group A Physicians are Not Consumers

With respect to the Group A Physicians, there are no disputed facts relating to the consumer issue. Simply put, the record is devoid of evidence tending to show that these Physicians' relationship to the transactions is sufficient to grant them consumer standing. They attempt to justify this lack of evidence by noting that the Debtor did not ask them who the purchaser was during their

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[7]Certain of the Group B Physicians stated in their depositions that, at times, the professional associations and hospitals would purchase the implants on consignment. See, e.g., Deposition of Curtis Baldwin, M.D. at 89-91. In these situations, the Debtor would supply the implants to the professional associations or hospitals, but would not require immediate payment. Only after the implant procedure was performed and payment received from the patient would the professional association or hospital be required to pay the Debtor. These transactions will not be addressed separately for they were essentially just credit sales to the professional associations and hospitals. However, certain of these consignment transactions required the patient to pay the Debtor directly. This latter type of consignment is addressed separately. See infra p. 26-27.

depositions. See, e.g., Exhibit A to Response to Motion (summarizing Physicians' deposition testimony). But this is merely an excuse, not a justification. The Debtor is under no obligation to ferret out the information necessary to prove the Physicians' claims. It is the Physicians who have the burden of establishing their consumer standing and these particular Physicians failed to present any evidence that would enable them to do so. Therefore, as to those Physicians whose deposition testimony contained no information regarding the purchaser of the implants that they used, the Debtor's motion will be granted. Celotex, 477 U.S. at 323.[8]

3. The Group B Physicians are Not Consumers

The Debtor asserts that a non-purchasing plaintiff has consumer standing only if he was the intended beneficiary of the transaction and that, but for certain exceptions not applicable here, employees and independent contractors are merely incidental beneficiaries of purchases made by the employer or the party with whom they have contracted. Motion at 6-11. Accordingly, the Debtor contends that, as a matter of law, the Group B Physicians do not qualify as consumers. Id. The Group B Physicians assert that consumer status is afforded to any party who seeks to enjoy the benefits of a transaction and that because breast implant procedures constituted a large percentage of their medical practices, they did indeed seek to benefit from the transactions. Physicians' Response at 4-5. Therefore, they maintain that their relationship to the transactions is sufficient to furnish them with consumer standing.

As an initial matter, the Court rejects the Physicians' assertion that consumer status is accorded to any party who "seek[s] to enjoy the benefits of the transaction." Physicians' Response

[8]It is not just the dearth of evidence on this point in their deposition that creates this result. It is that plus the fact that they declined to produce documentary evidence responsive to this issue.

at 5 (citing Wheaton Van Lines v. Mason, 925 S.W.2d 722, 724 n.2 (Tex. App. 1996, writ denied)). This quoted statement has its genesis in the Texas Supreme Court decision of Flenniken, 661 S.W.2d at 707. The issue in that case was whether a bank that was not a party to the transaction giving rise to the plaintiff's consumer standing could be sued under the DTPA. Id. The court answered this question in the affirmative, stating that the plaintiffs "were consumers as to all parties who sought to enjoy the benefits of [the] transaction . . . ." Id. Thus, Flenniken established a standard for determining whether a defendant's relationship to the transaction is sufficient to impose liability upon it under the DTPA. See also Moritz v. Bueche, 980 S.W.2d 849, 855 (Tex. App. 1998, no writ) (applying the Flenniken standard correctly); Dewitt v. Prudential Ins. Co., 717 S.W.2d 414, 417-18 (Tex. App. 1986, no writ) (same). There is no indication in Flenniken, however, that this standard was meant to apply to the other side of the equation – that is, whether the plaintiff's relationship to the transaction is sufficient. To the extent that Wheaton Van Lines says otherwise, it is a misinterpretation of Flenniken. Also, the issue in Wheaton Van Lines was whether the defendant's actions were the producing cause of the plaintiff's injuries, not whether the plaintiff was a consumer. And it is abundantly clear that the court's comments on consumer standing, which were set forth in a footnote, were not meant to be a thorough analysis of the issue, and were mere dicta. Wheaton Van Lines, 925 S.W.2d at 724 n.2. Lastly, and most importantly, any argument that Wheaton Van Lines sets forth the proper standard for determining whether a non-purchaser qualifies as a consumer is precluded by the Texas Supreme Court's decisions in Kennedy and Arthur Anderson.

In Kennedy, a hospital's board of managers purchased health insurance coverage for its employees. Kennedy, 689 S.W.2d at 891. During a meeting with hospital employees, the insurance agent represented that the policy provided full preexisting condition coverage when, in fact, it did not. Id. This misrepresentation induced the plaintiff, an employee of the hospital, to opt for the hospital's group health plan instead of the full preexisting coverage plan offered through his wife's employer. Id. Soon thereafter, the plaintiff underwent surgery for a preexisting condition and the insurer refused to provide full coverage. The plaintiff brought suit against the insurer claiming that it had violated the DTPA. Id.

The issue in Kennedy was whether the plaintiff, not being the actual purchaser of the insurance, qualified as a consumer for purposes of the DTPA. The court held that he did. It first reasoned that the plaintiff acquired the benefits of the insurance policy when he opted to be covered by its provisions. Id. at 892. But more importantly, the court reasoned that, even though the plaintiff was not the actual purchaser of the insurance policy, he qualified as a consumer because of the fact that the insurance was purchased "for his benefit by the hospital['s] . . . Board of Managers." Id. And while this holding could have been stated with more precision, Texas courts have consistently recognized this case as standing for the proposition that an individual can be a consumer of a purchase made by another if he was the intended beneficiary of that purchase. See Kitchener v. T.C. Trailers, Inc., 715 F.Supp. 798, 800 (S.D. Tex. 1988) ("The significance of the Texas Supreme Court's decision in Kennedy is that intended third-party beneficiaries of a purchase . . . are . . . considered consumers and, as such, have standing to maintain a DTPA cause of action. Kennedy does not stand for, nor does it even remotely suggest that incidental beneficiaries of a purchase or lease are consumers . . . ."); Arthur Anderson, 945 S.W.2d at 815 (interpreting Kennedy to mean that a non-purchaser can be a consumer if he is the intended beneficiary of the transaction); Lukasik v. San Antonio Blue Haven Pools Inc., 21 S.W.3d 394, 401 (Tex. App. 2000, no writ); Metropolitan

Life Ins. Co. v. Haney, 987 S.W.2d 236, 242-43 (Tex. App. 1999, no writ); Vinson & Elkins, 946 S.W.2d at 407 ("[W]hen an employer purchases goods or services for the benefit of an employee, the employee has consumer status under the DTPA if the goods or services form the basis of his complaint . . ."); Brandon v. American Sterilizer Co., 880 S.W.2d 488, 491-92 (Tex. App. 1994, no writ).

The standard for determining whether a non-purchaser qualifies as a consumer was further developed and clarified in Arthur Anderson. In that case, the plaintiff corporation was interested in acquiring another company, Maloney Pipeline Systems. As acquisition talks progressed, the plaintiff informed Maloney that it would require audited financial statements as a condition of sale. 945 S.W.2d at 815. Maloney then hired the accounting firm of Arthur Anderson to perform the audit. Arthur Anderson was aware that the audit was being performed at the insistence of the plaintiff and that the plaintiff intended to rely on the results in making its decision. Thereafter, the plaintiff did rely on the audited financial statements in deciding to consummate the purchase. Id. After the close, however, it was discovered that the audit was faulty in that it depicted Maloney's financial condition in far too rosy a light. Id. at 814. The plaintiff sued Arthur Anderson for violations of the DTPA. The firm's defense was that the plaintiff was not a consumer because it had not actually paid for the audit. Id.

The court began by rejecting Arthur Anderson's underlying premise, that a non-purchaser cannot qualify as a consumer. It noted that it had already held that a plaintiff who is not the actual purchaser of the goods or services can acquire consumer standing "as long as . . . [he] is the beneficiary of the goods or services." Id. at 815 (citing Kennedy). The more difficult question was whether, for purposes of the DTPA, the plaintiff was a "beneficiary" of the services that the firm provided to Maloney.

In addressing this issue, the court recognized that the concept of receiving a benefit was something that could be construed very broadly. It observed, for example, that every external audit could conceivably be said to benefit numerous third parties. Id. But the court was careful to emphasize that its "holding [was] not so broad." Id. It stated that "Arthur Anderson's audit was not merely incidental to the sale of Maloney to the [plaintiff]," but instead, was specifically "intended to benefit [the plaintiff]." Id. As a result, the plaintiff was held to be a consumer of Arthur Anderson's services.

Kennedy and Arthur Anderson debunk the notion that a consumer is simply anyone who seeks to enjoy the benefits of the transaction. Rather, the rule established by these cases is that a non-purchaser can qualify as a consumer as long as he, she or it was an intended, as opposed to an incidental, beneficiary of the purchase. See also Wellborn v. Sears, Roebuck & Co., 970 F.2d 1420 (5th Cir. 1992).[9] Kennedy demonstrates that this rule is also meant to apply to non-

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[9]The Physicians explain Wellborn v. Sears, Roebuck & Co., 970 F.2d 1420 (5th Cir. 1992) in the following manner:

> In Wellborn, Ms. Wellborn purchased a garage door opener for the primary purpose and benefit of moving his [sic] car in and out of the garage. Bobby, who lived with Ms. Wellborn, was killed when the garage door opener malfunctioned. The Fifth Circuit held that even though the garage door opener was not purchased specifically for Bobby's benefit, he used it for his benefit and therefore he was a consumer under the DTPA.

Response to the Debtor's Reply at 3. This explanation misrepresents what actually transpired in the case.

The "Bobby" who lived with Ms. Wellborn was her fourteen-year-old son. Wellborn, 970 F.2d at 1423. Ms. Wellborn purchased a garage door opener and installed it at her home. At a time that she was away from home, at work, the garage door malfunctioned, trapped Bobby underneath and purchasing employees. See also Clark Equip. Co. v. Pitner, 923 S.W.2d 117, 128 (Tex. App. 1996, writ denied) (for an employee to acquire consumer status, "[he] must establish that the employer's primary purpose for purchasing or leasing the goods or services was to benefit the employee"); Haney, 987 S.W.2d at 242-43; Brandon, 880 S.W.2d at 490-93.

Kennedy held that employees are the intended beneficiaries of health insurance coverage purchased by their employer for their benefit. This result is fairly self-evident, of course, for the purpose of health insurance is to pay for some or all of the medical care that is furnished to covered individuals. Consequently, any individual who is covered by a health insurance policy is intended

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killed him. Id. Ms. Wellborn, as administratrix for Bobby's estate, sued the manufacturer for violating the DTPA. The manufacturer argued that Bobby was not a consumer because he was a "mere incidental" beneficiary of the transaction. Id. at 1426. It reasoned that this was so inasmuch as Bobby was not licensed to drive and, therefore, "could not use the garage door opener for its primary purpose." Id.

Contrary to what the Physicians suggest, however, the court flatly rejected the manufacturer's assertion that Bobby was a mere incidental beneficiary. The court recognized that Bobby was not the only intended beneficiary of the transaction. Id. (stating that Ms. Wellborn "did not purchase the garage door opener specifically for Bobby's benefit"). But it also recognized that Bobby was indeed an intended beneficiary of the purchase when it accepted Ms. Wellborn's contention that one of the reasons she purchased the product was to provide Bobby safer and more secure access to their home on the nights when she worked. Id. Accordingly, the court concluded that Bobby was a consumer because "the garage door opener . . . was purchased [by his mother] for his benefit." Id. at 1427 (emphasis added).

It is apparent, then, that Wellborn does not stand for the proposition that a consumer is anyone who seeks to enjoy the benefits of a transaction. Rather the case uses the same standard adopted by the Texas Supreme Court in Kennedy v. Sale, 689 S.W.2d 890, 892 (Tex. 1985) and Arthur Anderson & Co. v. Perry Equip. Corp., 945 S.W.2d 812, 815 (Tex. 1997) that a non-purchaser will qualify as a consumer if he was an intended, as opposed to an incidental, beneficiary of the transaction. In fact, in a different pleading the Physicians acknowledged that this was the holding of Wellborn. They stated that "Texas law is clear that the purchase by a third party does not destroy consumer status, where . . . [the goods] were purchased for the plaintiff's benefit." Response to Motion at 6 (citing Wellborn, 970 F.2d at 1420).

to benefit from the purchase of that policy. See also, e.g., Birchfield, supra (holding that an infant covered by an insurance policy purchased by her parents was an intended beneficiary of that policy). One can also posit other types of employer purchases, such as the acquisition of safety equipment designed to create a safer work environment for employees, that would likely lead to the same result.

But it does not follow that employees will be the intended beneficiaries of all or even most of their employer's purchases. Most purchases made by an employer are for products or services that are intended to be used in the business's ordinary day-to-day operations. And post-Kennedy decisions have consistently held that, when an employer purchases goods or services for this purpose, the employees are not the intended beneficiaries of that purchase. Rather, courts view transactions of this nature as being primarily intended to benefit the employer and any benefit that might extend to an employee is merely incidental. As a result, courts hold that employees, as a matter of law, are generally not consumers of ordinary business transactions entered into by their employer. Clark Equip., 923 S.W.2d at 127-28 (holding that because the employer purchased a forklift for its own benefit, an employee who was injured by a defect in the forklift was not a consumer of the transaction); Brandon, 880 S.W.2d at 490-93 (concluding that hospital employee injured while using a defective sterilizer was not a consumer in regard to the acquisition of the sterilizer because the purchase was made for the primary purpose of benefitting the hospital in its day-to-day operations); cf. Haney, 987 S.W.2d at 242-43 (holding that insurance agent was not a consumer of a software program the insurer had developed to assist its agents because the insurer's primary purpose for doing so was to further its own business objectives and any benefit the agent derived therefrom was merely incidental). See also Hernandez v. Kasco Ventures, Inc., 832 S.W.2d 629, 633-34 (Tex. App. 1992, no writ); Lara v. Lile, 828 S.W.2d 536, 541-42 (Tex. App. 1992, writ denied).[10]

The Debtor asserts that the above cases are dispositive on the issue of whether the Group B Physicians were the the intended beneficiaries of the Implant Purchases made by their professional associations. It argues that these Physicians were using products purchased by their employer in the ordinary course of business and are, therefore, not consumers. The Physicians see things differently and put forth a number of arguments as to why they were the intended beneficiaries of the Implant Purchases.[11]

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[10]The Physicians suggested that at least two of the post-Kennedy cases do not represent good law because they state that an employee can acquire consumer status only if the employer's purchase was primarily for the employee's benefit. Clark Equip. Co. v. Pitner, 923 S.W.2d 117, 128 (Tex. App. 1996, writ denied); Brandon v. American Sterilizer Co., 880 S.W.2d 488, 491-92 (Tex. App. 1994, writ denied). Their criticism stems from the fact that "[t]here is not a single Texas Supreme Court case which holds that a plaintiff or employee is not a consumer unless the goods or services are purchased primarily for the plaintiff's or employee's benefit." Response to the Debtor's Reply at 2.

This criticism is off base, however. While Clark Equip. and Brandon use "primarily" instead of "intended," it is clear that they were using the same test as the one adopted by Kennedy and Arthur Anderson – that a non-purchaser can acquire consumer standing only if he was the intended, as opposed to incidental, beneficiary of the transaction. See Clark Equip., 923 S.W.2d at 128 ("If the employer's purchase . . . of the goods or services is primarily for the benefit of the employer's business and benefits the employee only incidentally, the employee does not acquire those goods or services to qualify as a consumer."); Brandon, 880 S.W.2d at 492 (same).

[11]As indicated, the Group B Physicians' primary argument was that they qualified as consumers of the Implant Purchases because they sought to enjoy the benefits of these transactions. But perhaps recognizing the futility of this position, the Physicians eventually acknowledged that non-purchasers can be consumers only if they were the intended beneficiaries of the transaction: "The Texas Supreme Court has ruled that in the employer/employee context, the goods have to have been purchased for the benefit of the employee who is claiming consumer status." Reply to Dow Corning's Supplemental Memorandum at 2. That said, it was sometimes difficult to tell to which test the Physicians' arguments were directed. In fact, some of their arguments did not appear to be directed toward any test at all. Giving the Physicians the benefit

They note that the Debtor directed its marketing efforts toward them. Response to Motion at 6 (citing Deposition of Arthur H. Rathjen, May 10-11, 1998). Their professional associations then purchased the Debtor's implants with the intent that the Physicians would use the implants in their practices. Id. at 5-6. The Physicians did use the implants in their practices, and as a result, they assert that they "benefitted directly" from the Implant Purchases. Id. Thus, when the situation is viewed in its entirety, the Physicians maintain that it would defy logic to say that they were merely incidental beneficiaries of these transactions. Id.

The Physicians primarily rely on Superior Trucks, Inc. v. Allen, 664 S.W.2d 136 (Tex. App. 1983, writ ref'd n.r.e.). See Physicians' Post-submission Brief at 4. In Superior Trucks, Jumel Allen decided to start a hauling business in which his brother, Richard, would do the driving. Superior Trucks, 664 S.W.2d at 140. After locating what seemed to be a suitable truck, the two brothers went to inspect it. Richard test-drove it, but apparently the truck was purchased in Jumel's name only. A defect in the truck later caused an accident, which resulted in injury to Richard, who then sued the truck seller under the DTPA. Id. at 140-41. Even though Richard was not the actual purchaser, the court held that he was a consumer for purposes of the DTPA because of his active involvement in the purchasing process. Id. at 147-48 (holding that "Richard . . . 'sought goods . . . by purchase'").

It is not clear from the opinion what Richard's relationship to the hauling business was. There was no indication from the opinion of corporate status, so it is likely that Richard and Jumel were operating a partnership. If Richard was a co-owner, then this case does not support the argument that the Physicians are consumers. As partners, the brothers would have both benefitted by the

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of the doubt, however, the Court has culled all possible arguments from their pleadings and applied them to the "intended beneficiary" test.

operation of the business. Because the truck would have been acquired for the primary benefit of the hauling business, Richard, as a partner, would have been an intended beneficiary of the purchase and was appropriately labeled a consumer.

On the other hand, if Richard was an employee of his brother's business, then this case is inconsistent with current Texas law. This is not surprising, however. Superior Truck was issued in 1983, two years prior to Kennedy and fourteen years prior to Arthur Anderson. Kennedy and Arthur Anderson now make it clear that a non-purchaser can qualify as a consumer only if he was the intended beneficiary of the transaction. Decisions rendered with the benefit of Kennedy and Arthur Anderson have uniformly held that an employee is generally not the intended beneficiary of a purchase made by an employer in the ordinary course of business. There is no logical reason to conclude that an employee's participation in the purchasing process should change this result. After all, the participating employee is acting as an agent of the employer and, differing compensation levels aside, receives no greater benefit from the acquisition of the item than a non-participating employee. Nor is there any reason to conclude that an employee's use of a product purchased by an employer should make that employee an intended beneficiary of the transaction. See Clark Equip., 923 S.W.2d at 127-28 (Although the employer intended for an employee to use the forklift when it purchased it, the employee injured while using it was not an intended beneficiary of the transaction.); Brandon, 880 S.W.2d at 490-93 (same result with a hospital's purchase of a sterilizer).

The fact is, the professional associations were businesses. And like any other business, they were formed for the purpose of making a profit. They accomplished this objective by providing medical services to their clients for a fee. Cf. Tex.Rev.Civ. Stat. art. 1528f §§ 2(B)(2) ("Doctors of medicine . . . may form an association . . . to perform a professional service that falls within the scope of practice of those practitioners."). The implantation of breast implants was one of the services that they provided. Therefore, in purchasing the breast implants, the professional associations were engaging in ordinary business transactions primarily intended to benefit themselves. Of course, all employees benefit from the successful operation of their employer's business. This, after all, pays the employees' salaries. And in this sense, the Physicians did receive a benefit from the breast implant purchases. But under Texas law, it is clear that the receipt of this type of benefit by an employee is purely incidental to the benefit that an employer receives from ordinary day-to-day business transactions. See Clark Equip., 923 S.W.2d at 127-28; Brandon, 880 S.W.2d at 490-93.

The Group B Physicians also seem to argue that they should be granted consumer standing because of the doctor-patient relationship between them and their patients. See Response to Motion at 6 (stating that the relationship that some of the plaintiffs in the post-Kennedy decisions had to the transaction was "hardly analogous to the relationship of a doctor and his patient"); Transcript, January 6, 2000 (counsel for Physicians intimating that the Physicians are different from other employees because of their relationship with their patients). The Court rejects this assertion. Whether the Physicians qualify as consumers is based upon their relationship to the transaction involving their professional associations and the Debtor. As a result, the Group B Physicians' relationship to their patients has no relevance to the present determination. Therefore, Physicians who used implants purchased by the professional associations of which they were employed are not consumers under the DTPA.

Some of the Group B Physicians used implants purchased by the hospitals where they performed the implant procedures. These Physicians would qualify as consumers if they were the intended beneficiaries of the Implant Purchases made by the hospitals. The Debtor argues that they were not and in support of this argument cites to the recent Texas Supreme Court decision of Crown Life Ins. Co. v. Casteel, 22 S.W.3d 378 (Tex. 2000).

Casteel was an independent insurance agent who sold insurance policies for the defendant, Crown Life. Id. at 381. While selling these policies, Casteel made representations to potential customers based upon information provided to him by Crown Life. When certain of these representations turned out to be false, individuals who bought the policies sued both Casteel and Crown Life. In turn, Casteel sued Crown Life for violating the DTPA. Id. at 382. Crown Life argued that Casteel was not a consumer. The court agreed, reasoning that Casteel was not a consumer because he “did not acquire or seek to acquire the policies; he was merely the conduit for information.” Id. at 387. Though not expressly stated in the opinion, it was apparent that the court concluded Casteel, as a mere conduit of the insurance policies, was at best an incidental beneficiary of the transaction and, therefore, not a consumer.[12]

The Physicians argue that Casteel is distinguishable because they were not mere conduits of the breast implants, but “were integral to the whole transaction.” Reply to the Debtor’s Supplemental Memorandum at 1. Of course, the Group B Physicians were important to the transaction between the hospitals and the patients. As the Physicians state, they evaluated the

[12] While the ruling in Casteel was clear, the court’s explanation as to why Casteel did not qualify as a consumer was fairly brief. The reason for this likely stems from the fact that Casteel admitted that he was not a consumer. Crown Life Ins. Co. v. Casteel, 22 S.W.3d 378, 386 (Tex. 2000). The primary issue in that case was whether Casteel, not being a consumer, had standing to sue Crown Life under the Texas Insurance Code for acts or practices declared to be unfair or deceptive under the DTPA. See Tex. Ins. Code. art. 21.21 (permitting separate cause of action for deceptive practices as that term is defined under the DTPA).

patient prior to the implant procedure, helped select the appropriate implant for the patient and then performed the actual surgical procedure. Id. at 2. But Casteel was just as important to the transaction between Crown Life and its insureds. Crown Life provided the marketing information on the various insurance policies to Casteel. He then presented this material to potential buyers and informed them of their options. Presumably, Casteel then helped process the transaction when the buyer decided to purchase a policy. Therefore, Casteel supports the Debtor's argument.

For the most part, however, Casteel is not applicable to the present situation. The transaction at issue in Casteel – the sale of insurance policies by Crown Life to the insured – was akin to the transactions that occurred between the hospitals and the patients. But the transactions at issue here are the ones that took place between the hospitals and the Debtor. The analysis of whether the Group B Physicians were consumers of these transactions is essentially the same as the analysis that the Court used with respect to the Implant Purchases made by the professional associations. Like the professional associations, the hospitals are businesses. It would, therefore, be illogical to conclude that the hospitals purchased the implants out of benevolence toward the Physicians. Nor is there any evidence on the record that would support such a conclusion. Rather, common sense leads to the conclusion that the hospitals purchased the implants in order to generate revenue to benefit themselves, and that any benefit which thereby accrued to the professional associations with which they contracted to perform the implant procedure was incidental at best. Because the professional associations were mere incidental beneficiaries of these transactions, there is simply no basis upon which to conclude that their employees, the Group B Physicians, were anything other than incidental beneficiaries as well. Therefore, the Group B Physicians who used implants purchased by the hospitals were not consumers with respect to these transactions.

There was one other type of Implant Purchase that pertains to the Group B Physicians. Some of these Physicians stated in their depositions that, while the implant was supplied by their professional association or the hospital where they performed the procedure, the patient was required to pay the Debtor directly for the cost of the implant. Deposition of Curtis Baldwin, M.D. at 89. As to these transactions, Casteel applies. With these Implant Purchases there was one more party (either the professional association or the hospital) involved than in Casteel. Nonetheless, the Physician's role was quite similar to that of the insurance agent in that case. Casteel was serving as a facilitator, or as the court termed it, a "conduit," between Crown Life and the potential buyers. While the Physicians may have been performing a more difficult task than was Casteel, their role was that of a facilitator as well. Consequently, the Court concludes that these Physicians were not the intended beneficiaries of the Implant Purchases between the Debtor and the patients.

For all of the above reasons, as a matter of law, the Group B Physicians were not consumers within the meaning of the DTPA with respect to any of the Implant Purchases. Therefore, the Debtor's DTPA Motion is granted as to these Physicians.[13]

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[13]The Group B Physicians whose DTPA claims will be dismissed are: Doctors Joseph Agris, Parvia Arfai, Charles Bailey, William Barnes, Patrick H. Beckham, Thomas Biggs, Raymond O. Brauer, Robert L. Clement, Benjamin Cohen, Ernest D. Cronin, James R. Cullington, William Davis, Johnathan J. Dora, Michael Eisemann, Simon Fredricks, Don A. Gard, David A. Grant, Robert Hamas, Charles Hollingsworth, Ted Huang, John C. Kelleher, Jr., Donald R. Klein, David Lee, Melvyn Lerman, Harold Mancusi-Ungaro, Jr., James Moore, E. Richard Parker, Robert D. Peterson, Norman H. Rappaport, Philip Rothenberg, Mark Schusterman, Wilton Simmons, Jr., Barry E. Swartz, Richard Toranto, Louis Walker, Edward Withers, Laurence E. Wolf, Robert Wood, Jr. and Natan Yaker.

4. Evidence of Purchasing Physicians Sufficient to Overcome Summary Judgment

The parties agree that an entity which is the actual purchaser of a good or service is a consumer for purposes of the DTPA. See, e.g., Debtor's Supplemental Memorandum at 2 (recognizing that the Physicians will qualify as consumers if they personally purchased the implants). The fact that the Physicians would have purchased the implants for resale does not change this result. Big H Auto Auction, Inc. v. Saenz Motors, 665 S.W.2d 756, 758 (Tex. 1984) (holding that an entity that buys goods for resale is a consumer of those goods within meaning of the DTPA). The Debtor asserts that there is no evidence showing that any of the Physicians personally purchased the implants. But the deposition testimony of seven of the Physicians suggests otherwise. See Depostion of Curtis Baldwin, M.D. at 89 ("Early in my career . . . I bought the implants and . . . patients would be charged whatever my charges were for getting the implants. I did that for a few years and then I stopped . . . ."); Deposition of Duane L. Larson, M.D. at 39-41 (stating that, at one point, he and another doctor with whom he was practicing would obtain the implants on consignment from the Debtor and then pay the Debtor after the patient paid for the augmentation); Deposition of Richard A. Levine, M.D., September 27, 1999 at 19-20 (stating that at times he "bought [the implants] from the company and then passed that on to the patient without a surcharge."); Deposition of Jeff R. Moore, M.D., September 16, 1999 at 21 & 40 (recounting that from the time he began performing implant procedures in 1964 until he formed his professional association in 1973 he purchased the implants himself); Deposition of Norborne B. Powell, Jr., M.D. at 21 (stating that he formed a sole proprietorship when he first went into practice and, thus, one could assume that he purchased at least some of the breast implants himself); Deposition of Sydnie Smith, M.D. at 27 (explaining that on certain occasions he would purchase the implants); Deposition of

AlfredoVillarreal-Rios, M.D. at 12 (likewise). It is not clear whether these seven Physicians have produced other evidence that would help substantiate their assertion that they purchased the implants themselves. Nonetheless, their deposition testimony is sufficient to create a fact issue as to whether they qualify as consumers. Therefore, the Debtor's motion for partial summary judgment will be denied as to these Physicians' claims.

An order consistent with this opinion will be entered forthwith.

Dated: November 3, 2000.

ARTHUR J. SPECTOR
U.S. Bankruptcy Judge